APPEAL NO. 93046

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On December 7, 1992, a contested case hearing was held in (city), Texas. The hearing officer determined that the appellant, carrier herein, did not timely dispute the impairment rating applied to respondent, claimant herein, resulting in that rating becoming final. Carrier asserts that it disputed the certification within 90 days so in effect disputed the rating; it also says that since the TWCC form 69 on which the rating appeared was invalid, it was not required to react within 90 days. Claimant did not respond.

DECISION

Finding that the hearing officer erred in concluding that carrier did not dispute the impairment rating within 90 days, we reverse and render.

Claimant was working as a carpenter for a construction company on January 7, 1992, when he hurt his neck by falling while carrying rebar on his shoulder. The only issue at this hearing was whether the carrier timely disputed the treating doctor's impairment rating. The carrier stipulated that (Dr. F) was claimant's treating doctor. On cross-examination, the claimant appears to have affirmed that Dr. F was the treating doctor. Since no question was raised as to this point, Dr. F will be accepted as the treating doctor.

The evidence does not directly address why a question of maximum medical improvement arose, but claimant testified that he believed he could go back to work, so he saw Dr. F about MMI and an impairment rating, apparently in May 1992. Claimant further testified that Dr. F sent him to "(clinic). . . to do the whole test." Claimant stated that Dr. F met with him after the Wellness Center had said his impairment was 15%, and testified regarding Dr. F, "(h)e said that I had gotten fifteen percent on the ratings, you know, because where I could turn and raise my arms and bend my back." Claimant then received a copy of the TWCC form 69 in early June 1992 which showed that MMI was reached on May 27, 1992, with 15% impairment.

The TWCC form 69 contained a signature in the signature block purporting to be that of Dr. F. In item 13, it contained, in very legible, precise printing, the following:

A.tripped carrying heavy object

C.Pt doing very well

Other than the date and impairment figure, item 14 contained the following:

See attached

The total attachment was two pages on the letterhead of "(Clinic)", with a heading of "Impairment Evaluation"; it was signed by CW. The last sentence of the "Impairment Evaluation" stated, "(m)y recommendation from this evaluation would be that this patient would benefit by an additional careful evaluation by (Dr. F) or another physician." (emphasis added) By letter, apparently signed by Dr. F, dated May 27, 1992, but shown at hearing as being prepared on October 20, 1992, Dr. F appeared to delegate certain functions:

> My insurance clerk, BH, has my full authorization to sign my name to any and all documents pertaining to workman's (sic) compensation. This includes: Forms, letters, and correspondence.

Claimant testified in regard to the TWCC form 69 which found MMI on May 27, 1992 with 15% impairment:

> First they said it was signed by a therapist. But it wasn't signed by a therapist, it was signed by the secretary.

No one controverted the evidence that the TWCC form 69 discussed above was signed by a person other than Dr. F; no one controverted the evidence that Dr. F's letter allowing another person to sign his name in certain instances was not prepared until October, although it recited a date of May. (We note that Article 8308-4.26(d) of the 1989 Act requires a "certifying" doctor, not just a "signing" doctor.)

The evidence at hearing indicates that a physical therapist provided an impairment rating in regard to claimant which was attached to a TWCC form 69 signed by an insurance clerk. To reach a resolution of this appeal, we do not have to decide the effect combining these two occurrences would have upon the validity of certification of MMI and an impairment rating.

The hearing officer found that the carrier filed a TWCC form 21 within 90 days of an impairment rating being assigned to the claimant, but that such form only indicated that a physical therapist completed the TWCC form 69, and it did not dispute the rating. Contrary to the hearing officer, we view the carrier's assertion on the TWCC form 21, which included a statement that the doctor did not do the evaluation, as disputing whether MMI was properly certified and an impairment rating thereby established, in effect disputing the rating.

Article 8308-4.26(d) of the 1989 Act is not the only article in the 1989 Act that requires a doctor to act in regard to MMI and impairment rating, but it will suffice for the purpose at hand. "After the employee has been certified by a doctor as having reached maximum medical improvement, the certifying doctor shall evaluate the condition of the employee and assign an impairment rating. . . The certifying doctor shall issue a written report to the

commission. . .certifying that maximum medical improvement has been reached, stating the impairment rating. . . ." Article 8308-1.03(17) of the 1989 Act says, ""Doctor" means a doctor of medicine, a doctor of. . . ." This definition does not include a "physical therapist", which was the thrust of the attack made within 90 days upon the TWCC form 69. (We do not imply that a doctor cannot use consultants, including a physical therapist, to measure impairment so long as the certifying doctor makes the report his own.)

Texas Workers' Compensation Commission Appeal No. 92670 dated February 1, 1993, also pointed out that under Article 8308-4.26(d) of the 1989 Act an impairment rating cannot be assigned without a certification of MMI, and without that certification the rating cannot be "made final". This decision went on to say that both MMI and the impairment rating "either became final together, or not."

In Texas Workers' Compensation Commission Appeal Nos. 91083 and 91084, dated January 6 and January 3, 1992, we indicated that whether the information provided the criteria in question (in that instance MMI) was more important than using a particular form. More recently, in Texas Workers' Compensation Commission Appeal No. 92628, dated January 4, 1993, a designated doctor's report did not use the TWCC form 69 and did not say "MMI was reached on _____." The doctor's report did, however, contain a description of the claimant's medical condition in terms meeting the requirements for MMI found in Article 8308-1.02(32) of the 1989 Act. The Appeals Panel decision pointed out that use of the correct form probably would have assured the entry of a date of MMI, but also concluded MMI was found based on the information in the report.

While Texas Workers' Compensation Commission Appeal No. 92164, dated June 5, 1992, pointed out that a claimant, who is not a medical doctor, could not reach MMI based on his testimony alone, it acknowledged that the claimant could attack a finding of MMI by "pointing out defects in a certification of MMI." Similarly, in Texas Workers' Compensation Commission Appeal No. 92394, dated September 17, 1992, the Appeals Panel said that a claimant, under W. C. Comm'n, TEX. ADMIN. CODE § 130.6 (Rule 130.6) can dispute either MMI or an impairment rating without presenting medical evidence to buttress the dispute. That opinion did not call for any words of art to be used in order to raise a dispute. It did say, predating Appeal No. 92670, *supra*, "(b)ut, even assuming that a `dispute' over the existence of MMI had not been expressly raised, it is clear that the threshold issue of the existence of MMI cannot be neatly severed from assessment of an `impairment rating'."

The language in the TWCC form 21 did not clearly phrase the dispute, but it did say that a doctor did not complete the TWCC form 69, which form indicated MMI was reached and an impairment rating provided. To avoid controversy, the language in a relevant rule or statute should be considered prior to acting thereunder. While the language found in Rule 130.5 was not used to dispute the rating, that rule does not operate in a vacuum any more than any other rule. Although Rule 130.5(e) says nothing about notice, Texas

Workers' Compensation Commission Appeal No. 92526, dated November 25, 1992, questioned whether the 90 days began to run from the time the parties knew of the assessment, not from the time the doctor may have written it down, and Texas Workers' Compensation Commission Appeal No. 92693, dated February 8, 1993, stated that the time period does not necessarily run from the date impairment is assigned. In addition, other parts of Rule 130.5 impose duties, relative to the fact situation, on a carrier that disputes an impairment rating. These examples show that allowing an impairment rating to be disputed within 90 days through an attack on the underlying certification of MMI is not the only instance in which application of Rule 130.5(e) may be considered using standards other than those listed in the rule itself.

To illustrate once more that an attack upon the underlying statutory requirements of certification should be considered an attack upon the result of that certification, Texas Workers' Compensation Commission Appeal No. 92412, dated September 28, 1992, stated, "Neither the report containing the signature block of Dr. K, nor any other document attached thereto, was signed by him. This. . .would render it defective to certify MMI or establish an impairment rating." (emphasis added)

Because we reverse and render that the TWCC form 21 served to dispute the impairment rating within the 90 day time period, we do not have to answer the second question raised on appeal--whether the rating that resulted from the TWCC form 69 that indicated MMI on May 27, 1992, was invalid and therefore raised no requirement for anything to be disputed within 90 days.

The decision of the hearing officer is reversed and a new decision rendered that MMI and the impairment rating were timely disputed. We observe that the hearing officer commented at the hearing that if there was a timely, sufficient dispute, appointment of a designated doctor would be an appropriate next step in the dispute resolution process. Income benefits that are due (*See* Article 8308-4.21 of the 1989 Act) should be paid pending resolution.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge